

1 **STEPHEN F. HENRY, ESQ.**

2 STATE BAR # 142336

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8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT

10 FOR THE

11 NOTHERN DISTRICT OF CALIFORNIA

12 DAVID ZWEIG, an individual,

13 Plaintiff,

14 vs.

15 YOSI, INC., a New York corporation,

16 Defendant.

Case No. 17-cv-05624-WHA

**DECLARATION OF DAVID ZWEIG IN
SUPPORT OF OPPOSITION TO
MOTION TO SET ASIDE DEFAULT
AND DEFAULT JUDGMENT**

Hearing Date: September 12, 2019

Time: 8:00 a.m.

Location: Courtroom 4

Hon. William Alsup

17 I, David Zweig, declare:

18
19 1. I am the Plaintiff in this action and therefore I personally familiar with and
20 have personal knowledge of the facts and issues set forth herein.

21
22 2. I entered into a contract of employment with the Defendant Yosi, Inc., a
23 healthcare-technology startup ("Defendant") on or around September 19, 2016, pursuant to
24 which I was to serve as the Defendant's "Chief Strategy Officer," for a limited time, after which
25 my position would be converted to a high-level sales role.

26
27 3. The contract of employment specifically provided that I would be working from
Piedmont, California, as opposed to Defendant's headquarters in New York City.

1 4. Throughout the term of my employment with the Defendant, I worked from my
2 office in Piedmont, California and Defendant was aware of this fact.

3 5. The employment agreement specifically stated that “[my] primary business office
4 and normal place of work will be Piedmont, California.” Defendant further assigned me a sales
5 territory covering California and the West coast.

6 6. Yosi had a strong desire to sell its product to doctors in California and I was part
7 of a substantial marketing effort directed at doctors in California. While I worked for Yosi, I and
8 a colleague made 40 cold calls in person in Los Angeles on behalf of Yosi, trying to sell its
9 product in California. I also called dozens of California doctors' offices by phone, attempting to
10 sell Yosi's product. In addition, I sent out hundreds of sales mailings to doctors in California.

11 7. I was terminated in the following manner: After not have been paid for nine
12 months and having been the recipient of countless lies, misrepresentations and broken promises,
13 and after Prasad took my largest potential account, having no further recourse I informed Prasad
14 that I would not discuss Yosi business until I was paid. Prasad immediately wrote a colleague of
15 mine and stated said that he would not continue to work with me and would immediately pay me
16 all salary due.

17 8. At the time that I filed my lawsuit against Yosi, I was aware that Yosi had been
18 previously represented by counsel. I was aware that attorney Maher represented Yosi during our
19 employment and investment contract negotiations. There was no reason in my mind why Hari
20 Prasad could not hire counsel to address the lawsuit.

21 9. After the lawsuit was filed, three attempts were made by two different process
22 servers to effect personal service on Mr. Prasad, but Prasad avoided service.

23 10. After our failure to effect personal service on Mr. Prasad, I contacted the
24 Delaware Division of Corporations to ascertain the name and address of the registered agent for
25 Yosi, Inc. if any.
26
27

1 11. Pursuant to Delaware corporations law, all Delaware corporations such as the
2 Defendant are required to maintain a registered corporate agent within the State of Delaware that
3 is authorized to accept service of legal process on behalf of the corporation.

4 12. However, my brief investigation revealed that Defendant had no appointed
5 registered agent in the State of Delaware because it had failed to pay the registered agent's
6 annual fee for services.

7 13. On November 30, 2017, I hired JS Legal Services process server in New York
8 City.

9 14. On December 1, 2017, I called the Delaware Department of Corporations to learn
10 who could be served process within Yosi. They identified three other directors besides Prasad:
11 one was not locatable and one is a Yosi employee. I was advised by the Delaware Division of
12 Corporations that Dr. Jonathan Feistmann, a Manhattan-based eye doctor, was an active director
13 of the Defendant's corporation.

14 15. I was also given the name Harvard Business Services as Yosi's listed agent.
15 Calling Harvard, I learned that Yosi had not maintained its account in good standing and Harvard
16 could not accept service for it. This was in violation of Yosi's charter and Delaware Laws.

17 16. On December 4, 2017, JS Legal Services attempted service at Yosi's office and
18 was refused admission.

19 17. On December 5, 2017, JS Legal Services attempted service at Yosi's office and
20 was refused admission.

21 18. I then chose to serve Feistmann as a director based on the following information:

- 22 • The Delaware Department of Corporations identified Feistmann as a director.
- 23 • Delaware Department of Corporations continues to identify Feistmann as a
24 director.
- 25 • Feistmann had been personally introduced to me and others as a director.
- 26 • Feistmann attended two business meetings in New York City, with me present, as
27 a director.

- 1 • Feistmann was listed on Yosi's website as a director.
- 2 • Directors are legal recipients of legal processes
- 3 • Feistmann has a duty of care to inform Yosi of the served process.
- 4 • Feistmann is an investor in Yosi and his son works for Yosi.

5 19. On December 7, 2017, JS Legal Services went to Director Jonathan Feistmann's
6 office and he was served. In each case, the process was addressed to Yosi, Inc. and not
7 Feistmann's business, NYC Retina. No answer was ever filed. Subsequently, we filed an
8 amended complaint in the California action.

9 20. This amended complaint was personally served on Dr. Feistmann on April 3,
10 2018.

11 21. I have made substantial efforts to effect service in both actions, and Plaintiff's
12 efforts to enforce the California judgment in New York.

13 22. On August 28, 2018, after judgment was obtained, I was advised by a North
14 Carolina attorney that he could garnish payments to Yosi from its only meaningful customer
15 located in Wake County, North Carolina. A motion was filed August 23, 2018. Prasad was
16 served by mail on September 4, 2018.

17 23. In February 2019, Yosi retained New York counsel, Alejandro Maher, Esq. of
18 Frigon, Maher, and Stern LLP, who made an offer of settlement and threatened to have the
19 judgment overturned in New York but made no attempt to have the judgment in this Court
20 vacated.

21 24. On February 14, 2019, I learned that the North Carolina attorney was mistaken
22 and that Prasad would have to be an North Carolina resident or own real property in the state for
23 the motion to go forward. I began the process of localizing the judgment to New York for
24 collection.

25 25. On or around April 1, 2019, an attorney that I hired in New York to collect on the
26 judgment filed a motion for summary judgment in lieu of Complaint in the Supreme Court of
27 New York, New York County.

1 26. On April 4, 2019, Yosi's lawyer Maher wrote to my New York lawyer stating
2 Maher is "not authorized to accept service on behalf of [his] client". Maher indicates Prasad has
3 ordered him not to accept service.

4 27. The relief sought through this motion was essentially domestication and
5 recognition of the above-referenced California judgment in the State of New York.

6 28. After filing this action, we served Maher, by sending a copy of the motion via
7 priority U.S. Mail to Maher's address in New York City.

8 29. This mail was delivered as it was not returned to sender.

9 30. Subsequently, I made significant efforts to personally serve Defendant and its
10 CEO Prasad at their WeWork office in New York City.

11 31. We hired two separate process servers to attempt to effectuate personal service
12 upon Prasad, but neither could do so as they were both denied access to Defendant's offices by
13 the security desk in the lobby of the Defendant's building.

14 32. Subsequently, we contacted the Delaware Division of Corporations to ascertain
15 the name and address of Defendant's registered agent.

16 33. We learned that nothing had changed from 2017 and that Defendant still did not
17 have an active registered agent in Delaware because Defendant had failed to pay the registered
18 agent's fees.

19 34. Accordingly, I again contacted the Delaware Division of Corporations seeking to
20 ascertain the names and addresses of Defendant's active officers and directors.

21 35. I was advised by the Division of Corporations that Dr. Jonathan Feistmann
22 remained an active Director of the Defendant's corporation.

23 36. Accordingly, on April 10, 2019, a process server personally served Dr. Feistmann
24 with copies of the motion for summary judgment in lieu of complaint filed in New York. As in
25 the December 2017 service, the process was clearly addressed to Yosi, Inc., and not to
26 Feistmann's business, NYC Retina.

37. A true and accurate copy of the affidavit of service upon Dr. Feistmann is attached hereto as *Exhibit A*.

38. At no point did Dr. Feistmann advise any process server that he was not authorized to accept service on behalf of Yosi.

I declare under penalty of perjury under the laws of the United States and California that the foregoing is true and correct. Executed in Piedmont, California on July 16, 2019.

By David
David Zweig

EXHIBIT A

JACOB SINGER & ASSOCIATES

1357 BROADWAY, PMB 418

NEW YORK, N.Y. 10018

TEL.: (212) 760-2300

FAX: (212) 760-0188

AFFIDAVIT OF PERSONAL SERVICE

SUPREME COURT OF NEW YORK STATE
COUNTY OF NEW YORK

DAVID ZWEIG

VS.

INDEX# 651887/2019

YOSI INC.

State of New York, County of New York, SS:

JACK JOHNSON

, being duly sworn deposes and says that deponent is over the age of eighteen years, is not a party to this action, and is a resident of New York State.

On **APRIL 10/2019 AT 11:50 A.M. at: 20 EAST 9TH STREET**

NEW YORK, N.Y. 10003 Deponent served the annexed:

SUMMONS:

NOTICE OF MOTION(ORAL ARGUMENT REQUESTED ONLY IF OPPOSED):

AFFIRMATION OF COUNSEL IN SUPPORT OF MOTION:

AFFIRMATION OF DAVID ZWEIG IN SUPPORT OF MOTION:

NOTICE OF ELECTRONIC FILING.

on **DR. JONATHAN FEISTMANN** by delivering a true copy to said **DR. JONATHAN FEISTMANN** personally.

Non-Military Investigation: Deponent asked the person spoken to whether **DR. JONATHAN FEISTMANN** was in the military service of the U.S. Government and was told **DR. JONATHAN FEISTMANN** was not

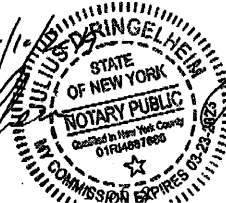
Deponent describes the individual served as follows:

SEX/RACE (skin color): **MALE / WHITE**

HAIR COLOR/ APPROXIMATE AGE; **DARK BROWN / 40-45 YRS.**

APPROXIMATE HEIGHT/ APP. WEIGHT: **6'2" / 190 LBS.**

1543/PS4.19-17

Sworn to before me 4/10/19
Julius D. Dringelheim

Jack Johnson
JACK JOHNSON
#2037237